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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	86420598
Applicant	MT Enterprises LLC
Applied for Mark	THE NO PULL HARNESS & LEASH IN ONE
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)	Serial No.: 86/ 420598
IN RE: MT Enterprises LLC)	Filed: October 10, 2014
)	Mark: THE NO PULL
)	HARNESS & LEASH IN ONE
)	Int. Class: 018
)	

Page 1

Table of Contents

	<u>Page</u>
Table of Contents	2
Index of Cases	3
I. INTRODUCTION	6
A . Description of the Record	7
B . Statement of the Issues	7
II. ARGUMENTS	8
A . The Marks are Dissimilar When Properly Viewed in Their Entireties	9
B . The Number and Nature of Similar Marks in Use on Similar Goods	11
C . High Degree of Consumer Care	16
D . There Can Be No Likelihood of Confusion	18
III. SUMMARY	18

Index of Cases

<u>CASES</u>	<u>PAGE</u>
<i>AMF Inc. v. Am. Leisure Prods., Inc.</i> , 474 F.2d 1403, 1406 (CCPA 1973)	16
<i>Astra Pharmaceutical Prods., Inc. v. Beckman Instr., Inc.</i> , U.S.P.Q. 786, 790 (1 st Cir. 1983)	17
<i>In re Broadway Chicken, Inc.</i> , 38 USPQ2d 1559, 1565-66 (TTAB 1996)	15
<i>Citigroup Inc. V. Capital City Bank Group, Inc.</i> , 537 F.3d 1344, 1356, 98 U.S.P.Q.2d 1253, 1261 (Fed. Cir. 2011)	10
<i>Clairol Incorporated v. Roux Laboratories</i> , 58 C.C.P.A. 1170, 442 F.2d 980, 169 U.S.P.Q. 589 (1971)	8
<i>In re Coca-Cola Co.</i> , 2007 WL 3320310 (TTAB 2007)	16
<i>In re Dayco-Products-Eagle Motive, Inc.</i> , 9 U.S.P.Q.2d 1910 (T.T.A.B. 1988)	15
<i>In re E.I. du Pont de Nemours & Co.</i> , 476 F.2d 1357, 177 U.S.P.Q. 563 (C.C.P.A. 1973)	8
<i>Electronic Design and Sales, Inc. v. Electronic Data Sys. Corp.</i> , 954 F.2d 713, 718-19 (Fed. Cir. 1992)	17
<i>Elvis Presley Enter. Inc. v. Capece</i> , 141 F.3d 188 (5 th Cir. 1998)	18
<i>Estee Lauder, Inc. v. The Gap, Inc.</i> , 108 F.3d 1503 (2 nd Cir. 1997)	18
<i>In re Farm Fresh Catfish Co.</i> , 231 U.S.P.Q. 495 (T.T.A.B. 1986)	10
<i>General Mills, Inc. v. Kellogg Co.</i> , 3 U.S.P.Q.2d 1442 (8 th Cir. 1997)	15

CASES	PAGE
<i>In re Hamilton Bank</i> , 222 U.S.P.Q. 174 (T.T.A.B. 1984)	15
<i>International Ass'n of Machinists & Aerospace Workers v. Winship Green Nursing Ctr.</i> , 103 F.3d 196 (1 st Cir. 1996)	18
<i>Litton Sys., Inc. v. Whirlpool Corp.</i> , 221 U.S.P.Q. 97, 112 (Fed. Cir. 1984)	16
<i>Magnavox Co. v. Multivox Corp. of America</i> , 52 C.C.P.A. 1025, 341 F.2d 139, 144 U.S.P.Q. 501 (1965)	8
<i>McGregor-Coniger Inc. v. Drizzle, Inc.</i> , 599 F.2d 1126 (2 nd Cir. 1979)	18
<i>In re Nat'l Data Corp.</i> , 753 F.2d 1056, 224 U.S.P.Q. 749 (Fed. Cir. 1985)	9
<i>Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En</i> 1772, 396 F.3d 1369, 73 USPQ2d 1689, 1693 (Fed. Cir. 2005)	11
<i>Plus Prods. v. Star-Kist Foods, Inc.</i> , 220 U.S.P.Q. 541, 543-44 (T.T.A.B. 1983)	13
<i>Puma-Sportschuhfabriken Rudolf-Dassler G.m.b.H. v. Superga S.p.A.</i> , 210 U.S.P.Q. 31 (T.T.A.B. 1980)	14
<i>In re RAM Oil, Ltd., LLP</i> , Serial Nos. 77/280977 and 77/280981 p. 12 (T.T.A.B. 2009)	17
<i>Red Carpet Corp. v. Johnstown American Enterprises Inc.</i> , 7 U.S.P.Q.2d 1404 (T.T.A.B. 1988)	13
<i>Royal Petroleum Corp. v. Riverstates Oil Co.</i> , 136 U.S.P.Q. 79 (T.T.A.B. 1962)	16
<i>In re Shawnee Milling Co.</i> , 225 U.S.P.Q. 747 (T.T.A.B. 1985)	10

CASES	PAGE
<i>In re Shell Oil Co.</i> , 992 F. 2d 1204, 26 U.S.P.Q.2d 1687, 1689 (Fed. Cir. 1993)	9
<i>Shen Mfg. Co. v. Ritz Hotel Ltd.</i> , 393 F.3d 1238, 1245, 73 U.S.P.Q.2d 1350, 1356-57 (Fed. Cir. 2004)	10
<i>Spice Islands, Inc. v. Frank Tea & Spice Co.</i> , 184 U.S.P.Q. 36 (C.C.P.A. 1994)	8
<i>Sports Authority Michigan Inc. v. PC Authority Inc.</i> , 63 U.S.P.Q.2d 1782 (T.T.A.B. 2002), <i>appeal dismissed</i> , (Fed. Cir. Sep. 09, 2002)	10
<i>Standard Brands, Inc. v. R.J.R. Foods, Inc.</i> , 192 U.S.P.Q. 383 (T.T.A.B. 1976)	15
OTHER AUTHORITIES	
15 U.S.C. § 1052(d)	6
TMEP § 1207.01	6
J. Thomas McCarthy, <i>McCarthy on Trademarks and Unfair Competition</i> , § 11:86	16
J. Thomas McCarthy, <i>McCarthy on Trademarks and Unfair Competition</i> , § 23:3	18

I. INTRODUCTION

MT Enterprises LLC (hereinafter “Applicant”) hereby appeals the Examining Attorney’s final refusal dated August 28, 2015 to register the trademark THE NO PULL HARNESS & LEASH IN ONE based upon Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d) and respectfully requests that the Trademark Trial and Appeal Board reverse the Examining Attorney’s decision. No oral hearing is requested.

Applicant’s Mark

Applicant seeks registration on the Principal Register of its mark THE NO PULL HARNESS & LEASH IN ONE for “animal harnesses for dogs; animal leashes; dog leashes; leashes for animals; pet products, namely, pet restraining devices consisting of leashes, collars, harnesses, retraining straps, and leashes with locking devices” in International Class 18 (hereinafter “Applicant’s Mark”).

Cited Registration

The Examining Attorney refused registration of the above-identified trademark by citing one registration, namely, U.S. Registration No. 1822770 for the mark NO-PULL for “halters for domesticated animals” in International Class (hereinafter “Cited Mark”), as to be likely to cause confusion, to cause mistake or to deceive. Trademark Act Section 2(d), 15 U.S.C. §1052(d); *see TMEP §§1207.01 et seq.*

Applicant respectfully requests that the Trademark Trial and Appeal Board review this matter, reverse the Examining Attorney’s decision refusing registration, and direct that a Notice of Publication be issued.

A. Description of the Record

The evidence of record in this appeal consists of the Applicant's application for registration of the mark in International Class 18; Office Action No. 1 dated February 2, 2015; the Applicant's Response to Office Action No. 1 dated August 2, 2015; the second and Final Office Action No. 2 dated August 28, 2015; the Applicant's Request for Reconsideration dated December 2, 2015 and the continuation of Final Refusal under Trademark Act 2(d) issued by the Examining Attorney on February 2, 2016 in the Request for Reconsideration Denial.

On February 25, 2016, Applicant filed a Notice of Appeal with the Trademark Trial and Appeal Board ("TTAB"). The TTAB allowed Applicant sixty days to file an Appeal Brief which is due on or before April 25, 2016.

The evidence of record also consists of the following:

1. Third-party registrations of marks used in connection with the same or similar goods as those of Applicant and Registrant submitted by the Examining Attorney and Applicant.
2. Third-party registrations for marks containing the term "PULL" submitted by Applicant.
3. Snapshots of websites cited by the Examining Attorney.

The Applicant hereby incorporates by reference all arguments and exhibits previously made of record.

B. Statement of the Issues

The issues on appeal are:

1. Whether "NO PULL" is a proper basis on which to assert that confusion is likely.

Applicant submits that it is not, because:

- a. there are several PULL-containing registered marks in International Class 18 so that the term should be considered weak; and
- b. the remaining elements of the marks are sufficient to distinguish the marks.

2. Whether the Examining Attorney erred by ignoring the words and characters “THE”, “HARNESS”, “&”, “LEASH”, “IN” and “ONE” in the likelihood of confusion analysis.

3. Whether Applicant’s Mark and the Cited Mark can travel in the same channels of trade without confusion in view of the sophisticated consumer and high degree of consumer care in purchasing pet products.

II. ARGUMENTS

In refusing registration of the Applicant’s mark, the Examining Attorney correctly references the factors set out in *In re E.I. du Pont de Nemours & Co.* as guidance in determining the likelihood of confusion between two marks, namely, that the marks must be compared for similarity as to appearance, sound, connotation and commercial impression. *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 U.S.P.Q. 563 (C.C.P.A. 1973).

In determining whether a likelihood of confusion exists between two marks, the marks must be compared *in their entirety* and not dissected into individual segments. *Spice Islands, Inc. v. Frank Tea & Spice Co.*, 184 U.S.P.Q. 36 (C.C.P.A. 1994); *Clairol Incorporated v. Roux Laboratories*, 58 C.C.P.A. 1170, 442 F.2d 980, 169 U.S.P.Q. 589 (1971); *Magnavox Co. v. Multivox Corp. of America*, 52 C.C.P.A. 1025, 341 F.2d 139, 144 U.S.P.Q. 501 (1965).

The basis of the Examining Attorney’s refusal is her assertion that the marks are similar because they both contain the common terms “NO PULL” and the additional descriptive and disclaimed wording “HARNESS & LEASH” and additional wording “THE” and “IN ONE” present in Applicant’s Mark is not sufficient to obviate confusion in light of this similarity.

It is the Applicant’s position that in reaching her conclusion that the marks are confusingly similar the Examining Attorney has failed to consider Applicant’s Mark in its entirety. Moreover, similarity of the marks in either sight, sound, or meaning does not *automatically* result in a finding of likelihood of confusion even where the goods of the respective parties are identical or closely related.

A. The Marks Are Dissimilar When Properly Viewed In Their Entireties

Applicant respectfully submits that the refusal to consider the disclaimed elements of Applicant's Mark ("HARNESS & LEASH") and the additional elements ("THE" and "IN ONE") relevant to the assessment of similarity to the Cited Mark, was in error. The Examining Attorney writes:

... applicant has disclaimed the term HARNESS & LEASH, rendering NO PULL and IN ONE the more dominant elements of the mark.

Examining Attorney's second and Final Office Action No. 2, p. 2.

The Examining Attorney then writes:

... the marks are nearly identical in part in that they both contain the term NO PULL, the only difference in this portion of the mark being a hyphen in registrant's mark.

Examining Attorney's second and Final Office Action No. 2, p. 3.

While the Examining Attorney stated that the terms "NO PULL" and "IN ONE" are the dominant terms of Applicant's Mark, the terms "IN ONE" were discounted and not considered when the Examining Attorney states that the marks are nearly identical because they both contain the term "NO PULL". The mere fact that the word "PULL," itself a weak term in respect of pet products (as discussed below in greater detail), is common to Applicant's mark and the Cited Mark does not render the marks confusingly similar.

It is settled that "[t]he filing of a disclaimer with the Patent and Trademark Office does not remove the disclaimed matter from the purview of determination of likelihood of confusion." *In re Shell Oil Co.*, 992 F. 2d 1204, 26 U.S.P.Q.2d 1687, 1689 (Fed. Cir. 1993). *See also, In re Nat'l Data Corp.*, 753 F.2d 1056, 224 U.S.P.Q. 749 (Fed. Cir. 1985) (disclaimer has no legal effect on the issue of likelihood of confusion). This is so because confusion is evaluated from the perspective of the purchasing public, which is not aware that certain words or phrases have been disclaimed. *Id.* at 751. In this case, when encountering the parties' marks in the marketplace, the public will not know that the Applicant has disclaimed "HARNESS & LEASH". Instead, consumers will encounter the marks in their entireties as THE NO PULL HARNESS & LEASH IN ONE on the one hand, and NO-PULL on the other, when considering the purchase of pet products, namely, harnesses and halters.

The Board's analysis in *Sports Authority Michigan Inc. v. PC Authority Inc.*, 63 U.S.P.Q.2d 1782 (T.T.A.B. 2002), *appeal dismissed*, (Fed. Cir. Sep. 09, 2002) (opposition dismissed as to both applications) is instructive. Because the registrations and applications at issue all included disclaimers, Opposer focused on the presence of the term "Authority" in each mark, and argued that it was the dominant term in each mark. The Board posited however that "[i]t need not automatically follow, however, that, merely because the marks have the same dominant element, they are pronounced the same, look the same or present the same overall commercial impression." *Sports Authority* at 1792. In that case, the Board ultimately concluded that "though the marks share a significant element, they look different, sound different and create different specific commercial impressions." *Id.*

Clearly, additions to marks may be sufficient to avoid a likelihood of confusion if the marks in their entireties convey significantly different commercial impressions; or the matter common to the marks is not likely to be perceived by purchasers as distinguishing source because it is merely diluted. *See, e.g., Citigroup Inc. v. Capital City Bank Group, Inc.*, 637 F.3d 1344, 1356, 98 U.S.P.Q.2d 1253, 1261 (Fed. Cir. 2011) (affirming TTAB's holding that contemporaneous use of applicant's CAPITAL CITY BANK marks for banking and financial services, and opposer's CITIBANK marks for banking and financial services, is not likely cause confusion, based, in part, on findings that the phrase "City Bank" is frequently used in the banking industry and that "CAPITAL" is the dominant element of applicant's marks, which gives the marks a geographic connotation as well as a look and sound distinct from opposer's marks); *Shen Mfg. Co. v. Ritz Hotel Ltd.*, 393 F.3d 1238, 1245, 73 U.S.P.Q.2d 1350, 1356-57 (Fed. Cir. 2004) (reversing TTAB's holding that contemporaneous use of THE RITZ KIDS for clothing items (including gloves) and RITZ for various kitchen textiles (including barbeque mitts) is likely to cause confusion, because, *inter alia*, THE RITZ KIDS creates a different commercial impression). *In re Farm Fresh Catfish Co.*, 231 U.S.P.Q. 495 (T.T.A.B. 1986) (CATFISH BOBBERS (with "CATFISH" disclaimed) for fish held not likely to be confused with BOBBER for restaurant services); *In re Shawnee Milling Co.*, 225 U.S.P.Q. 747 (T.T.A.B. 1985) (GOLDEN CRUST for flour held not likely to be confused with ADOLPPH'S GOLD'N CRUST and design (with "GOLD'N CRUST" disclaimed) for coating and seasoning for food items).

Furthermore, the Examining Attorney appears to dismiss the differences in sound between the descriptive and disclaimed matter of Applicant's Mark – "HARNESS & LEASH". In this case, the marks look and sound different, with Applicant's Mark consisting of nine syllables and the Cited Mark consisting of two syllables. When viewed in their entirety, it is clear that the respective marks sound more dissimilar than similar to consumers. The dissimilarity of the marks in their entireties as to appearance and sound strongly supports a finding of no likelihood of confusion.

B. The Number and Nature of Similar Marks in Use on Similar Goods

"Evidence of third-party use of similar marks on similar goods is relevant to show that a mark is relatively weak and entitled to only a narrow scope of protection." *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1693 (Fed. Cir. 2005).

As stated above, the Examining Attorney, in refusing registration of Applicant's Mark, has separated the respective marks into their constituent parts, stating "the marks are nearly identical in part in that they both contain the term "NO PULL".

However, it is clear that third party usage of a mark on similar goods will render a mark relatively weak and entitled to a narrower scope of protection. In the context of the case at issue, third party usage of "PULL" as applied to pet products has rendered the term weak in that context. For example, the following registrations previously made of record, which incorporate the term 'PULL' in respect of various items of related pet products, already coexist on the Principal Register alongside the cited registration NO-PULL:

MARK	GOODS	REG. NO. APPL. NO.	ISSUE D FILED
PULL-EZE	Dog collars; dog collars and leads; dog leashes; pet restraining devices consisting of harnesses	4552850	06/17/2014
PULL STOP	Animal harnesses; harnesses; pet products, namely pet restraining devices consisting of	4172805	07/10/2012
SOFT-PULL	Leashes and leads for dogs, horses and animals; training devices in the nature of training leashes	4050074	11/01/2011
ONEPUL	Fixes dispensers of metal for pet waste bags	4581881	08/05/2014
FRISKIES PULL 'N PLAY	Pet food	4808919	09/08/2015
PULL-N-GO	Plastic bag for storing and dispensing pet products, namely, disposable housebreaking absorbent floor	4264070	12/25/2012
EZ PULL	Pet food covers	2809848	02/03/2004
POOCH PULL	Dog toys	4052865	11/08/2011
PULL & BEAR	Shampoos for pets, cosmetics for animals; beds for household pets	4381519	08/13/2013

The Examining Attorney's position with respect to this material is that "these few registrations are not evidence of what happens in the market place or that customers are familiar with them"; and "it is the unique combination of the terms NO PULL that is at issue, rather than the term PULL alone" (Reconsideration Letter dated February 2, 2016, p. 1.). The Applicant disagrees with the Examining Attorney. These third-party registrations clearly support the fact that the marks PULL-EZE, PULL STOP, SOFT-PULL, and NO-PULL are, in fact, highly similar marks that coexist for identical goods. These registrations have probative value to the extent that they serve to suggest that consumers are confronted with very similar marks containing the common term PULL for pet retraining devices and understand that they are of a kind that may emanate from the same source.

In *Red Carpet Corp. v. Johnstown American Enterprises Inc.*, 7 U.S.P.Q.2d 1404 (T.T.A.B. 1988), the Board explained that such third-party registrations are:

Competent to establish that a portion common to the marks involved in a proceeding has a normally understood and well-known meaning; that this has been recognized by the Patent and Trademark Office by registering marks containing such a common feature for the same *or closely related goods* where the remaining portions of the marks are sufficient to distinguish the marks as a whole; *and that therefore the inclusion Of [the common element] in each mark may be an insufficient basis on which to predicate a holding Of confusing similarity. [Emphasis added.]*

7 U.S.P.Q.2d at 1406. It is the Applicant's position that the third-party registrations are in connection with goods that can readily be understood to be "identical and highly related" and that, therefore, the Examining Attorney's conclusion that the Applicant's Mark and the Cited Mark are confusingly similar because they share the term NO PULL is simply incorrect.

The existence of these additional registrations support the fact that the term PULL is weak and only entitled to a narrow scope of protection. By allowing pet restraining devices incorporating the term "PULL" to coexist on the Principal Register, the Trademark Office has indicated that it considers the term "PULL" to be weak and diluted. *Plus Prods. v. Star-Kist Foods, Inc.*, 220 U.S.P.Q. 541, 543-44 (T.T.A.B. 1983) (multiple registrations for composite marks that included the word "PLUS" are evidence

that the Trademark Office and consumers would view “PLUS” as not entitled to broad protection.) Since no confusion was found between these additional registrations and the cited registration, there should be no confusion found between the cited registration and Applicant’s mark THE NO PULL HARNESS & LEASH IN ONE. Applicant believes that the coexistence of the cited registrations for marks containing the word PULL for identical and highly related goods indicates that its application is also registrable.

The sampling of registrations of record also serves as evidence to support the fact that the average consumer is repeatedly confronted with a variety of goods which bear the same or similar mark and is already aware that the goods bearing those marks do not emanate from the same source. After considering the coexistence of the cited registration along with the third-party registrations previously made of record containing the word PULL, it is clear that no one particular company has such exclusive use of the word PULL so as to preclude another from obtaining a registration; thus, the cited mark should be subjected to a narrow reading. *See Puma-Sportschuhfabriken Rudolf-Dassler kk.g.v. Superga S.P.a.*, 210 U.S.P.Q. 31 (T.T.A.B. 1980).

It is clear that the Patent and Trademark Office has already inherently recognized this narrow scope of protection by allowing multiple registrations containing the term “PULL” for identical and related goods. There can be no likelihood of confusion between Applicant’s mark THE NO PULL HARNESS & LEASH IN ONE for animal harnesses and leashes and Registration No. 4552850 for the mark PULL-EZE for pet restraining device consisting of harnesses, Registration No. 4172805 for the mark PULL STOP for animal harnesses, and Registration No. 4050074 for the mark SOFT-PULL for training leashes for animals. Clearly, the term PULL is weak in the pet products field and in particular, the pet restraining devices field. All of these marks coexist without any confusion because of the overall dissimilarities in the sound, meaning and commercial impression between the marks.

While Applicant understands that prior decisions and actions of other trademark examining attorneys in registering different marks have little evidentiary value and are not binding upon the Office, Applicant believes that the additional registrations in this case should hold great weight. “[E]vidence of third party usage of similar marks on similar goods is admissible and relevant to show that the mark is relatively weak and entitled to a narrow scope of protection.” *Standard Brands, Inc. v. R.J.R. Foods, Inc.*, 192 U.S.P.Q. 383 (T.T.A.B. 1976) *See also General Mills, Inc. v. Kellogg Co.*, 3 U.S.P.Q.2d 1442 (8th Cir. 1997).

Courts have interpreted third party registrations consistently with the foregoing. *In re Dayco-Products-Eagle motive, Inc.*, 9 U.S.P.Q.2d 1910 (T.T.A.B. 1988). In *Dayco*, the court held that applicant’s IMPERIAL for automotive products would not likely cause confusion with the cited trademark IMPERIAL for automobiles and structural parts thereof because IMPERIAL had been adopted by others in the vehicular field and as such, the scope of protection afforded such a mark is considerably narrower than that afforded a more arbitrary designation. *Id.* at 1910.

In another case the court held that applicant’s KEY for banking services would not cause confusion with KEYCHECK, KEY-CARD BANK, KEYBANKER and CB KEY for banking services because extensive third party adoption had diluted the trademark significance of the word KEY such that marks incorporating the term are entitled to a limited scope of protection. *In re Hamilton Bank*, 222 U.S.P.Q. 174 (T.T.A.B. 1984).

Courts have also held that evidence of widespread third-party use in a particular field, of marks containing a certain shared term is competent to suggest that the purchasers have been conditioned to look to other elements of the marks as a means of distinguishing the source of the goods or services in the field.” *In re Broadway Chicken, Inc.*, 38 U.S.P.Q.2d 1559 (T.T.A.B. 1996). Accordingly, terms in use by many sellers are not entitled to the same scope of protection as strong marks. Clearly, the term PULL is in

common use by other sellers and thus deserves a lesser scope of protection. *See Royal Petroleum Corp. v. Riverstates Oil Co.*, 136 U.S.P.Q. 79 (T.T.A.B. 1962); *See also, McCarthy on Trademarks and Unfair Competition*, § 11:86.

While Applicant's Mark THE NO PULL HARNESS & LEASH IN ONE and the Cited Mark NO-PULL both contain the weak term "PULL", the marks considered in their entireties are readily distinguishable from one another. In fact, the Board has recognized that consumers will be able to distinguish among the various marks with common elements by looking to other elements. *In re Coca-Cola Co.*, 2007 WL 3320310 (TTAB 2007); *AMF Inc. v. Am. Leisure Prods., Inc.*, 474 F2d 1403, 1406 (CCPA 1973). As a result, it is highly unlikely that consumers will believe that all marks containing the term PULL originate from the same source. In this regard, inclusion of the terms HARNESS & LEASH IN ONE enables consumers to readily distinguish between the respective parties' marks in view of the crowded field of pet products incorporating the term "PULL."

Clearly, the third-party registrations of record are at least as close to the Cited Mark as is Applicant's Mark. Given the prevalence of such third party utilization of the word "PULL" as applied to pet products, restraining devices and related accessories, it is clear that "PULL has become weak in that context. There therefore seems no good reason why Applicant's mark should not also be permitted to co-exist on the Principal Register. This applies all the more so when one considers the quite distinct differences in sound and appearance created by the respective marks.

C. High Degree of Consumer Care

Conditions under which the goods are encountered in the marketplace, and under which purchasing decisions are made, must be considered as well when evaluating the likelihood that a mark sought to be registered in an application might be confused with a registered mark. T.M.E.P § 1207. If the decision is made by a sophisticated purchaser, it may be sufficient to negate a likelihood of confusion even between marks of great similarity. *Litton Sys., Inc. v. Whirlpool Corp.*, 221 U.S.P.Q. 97,

112 (Fed. Cir. 1984). The goods offered under the Applicant's Mark and the Cited Mark are not impulse purchases. These goods require careful study and a thorough evaluation of the product provider. With the great diversity of pet harnesses, halters, leashes and collars directed to pet owners, these purchases are not likely to be made on impulse. These goods require careful study and a thorough evaluation of the product providers. The relevant consumers in the present case will only make a purchase after careful examination of the respective animal accessory providers. They are sophisticated consumers with specific needs. These consumers tend to be careful, discriminating buyers who study the source, quality, and characteristics of Applicant's and the cited Registrant's animal harnesses and halters. As a result, it is not likely or probable that such consumers would confuse Applicant's goods with the cited prior registrant's goods. *See Electronic Design and Sales, Inc. v. Electronic Data Sys. Corp.*, 954 F.2d 713, 718-19 (Fed. Cir. 1992) (holding that goods purchased by persons highly knowledgeable about the goods substantially lessens likelihood of confusion); *Astra Pharmaceutical Prods., Inc. v. Beckman Instr., Inc.*, U.S.P.Q. 786, 790 (1st Cir. 1983) ("There is always less likelihood of confusion where goods are expensive and purchased after careful consideration.").

The purchasers of Applicant's goods and the cited Registrant's goods are highly knowledgeable with respect to the pet restraining device industry. Accordingly, the high degree of care likely to be exercised by purchasers of the relevant goods, based on the very nature of the goods, does not support a finding of likelihood of confusion. *See, In re RAM Oil, Ltd., LLP*, Serial Nos. 77/280977 and 77/280981 p. 12 (T.T.A.B. 2009)(non-precedential)("safely assuming" that potential purchasers of goods and services which "by their very nature are unusual, complex and expensive," "are knowledgeable and careful consumers who exercise a high degree of care"). Purchasers of the relevant goods will exercise a high degree of care, and therefore focus on the trademark for the goods and become aware of the source of the goods. These sophisticated consumers are not likely to assume that the respective goods emanate from the same source merely because they are offered under marks comprising the word PULL. The purchasers would be aware of the practices of the pet restraining device industry and recognize that such goods do not emanate from a single source.

D. There Can Be No Likelihood of Confusion

Courts have consistently interpreted the likelihood of confusion standard as requiring much more than a “possibility” of confusion. *McGregor-Coniger Inc. v. Drizzle, Inc.*, 599 F.2d 1126 (2nd Cir. 1979) (an “appreciable number of ordinary prudent purchasers are likely to be misled, or indeed simply confused”); *International Ass’n of Machinists & Aerospace Workers v. Winship Green Nursing Ctr.*, 103 F.3d 196 (1st Cir. 1996) (“the law has long demanded a showing that the allegedly infringing conduct carries with it a likelihood of confounding an appreciable number of reasonably prudent purchasers exercising ordinary care”); *Estee Lauder, Inc. v. The Gap, Inc.*, 108 F.3d 1503 (2nd Cir. 1997) (“likelihood of confusion means a probability of confusion; it is not sufficient if confusion is merely ‘possible’”); *Elvis Presley Enter. Inc. v. Capece*, 141 F.3d 188 (5th Cir. 1998) (“likelihood of confusion is synonymous with a probability of confusion, which is more than a mere possibility of confusion”). In this case, the differences in the marks, coexistence of the cited registrations, and sophisticated consumers eliminate the probability of confusion between Applicant’s Mark and the Cited Marks. *See McCarthy on Trademarks and Unfair Competition*, § 23:3.

III. SUMMARY

For the reasons set forth herein, Applicant submits that no likelihood of confusion exists between Applicant’s Mark and the Cited Mark because there are real distinctions between the marks, especially since the only dominant element that the marks share is relatively weak, and inclusion of the additional disclaimed and descriptive portion HARNESS & LEASH and additional portion IN ONE of Applicant’s mark are sufficient to distinguish the marks.

The overall differences between the marks; the coexistence of the cited registration and additional registrations; the crowded nature of the field and weakness of the term PULL; and the sophistication of the consumer work together to eliminate any potential for a likelihood of confusion between Applicant’s Mark and the Cited Mark, despite the fact that they share the term NO PULL.

Applicant submits that there is no likelihood of confusion, mistake or deception between Applicant's Mark and the Cited Mark. Accordingly, Applicant respectfully requests the Board to reverse the Examining Attorney's decision refusing registration and to direct that a Notice of Publication be issued.

Dated: April 25, 2016

Respectfully Submitted,

/cheryl a. clarkin/

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